IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 22, 2009

STATE OF TENNESSEE v. JAMES RICHARD LENING

Appeal from the Criminal Court for Davidson County
No. 2007-B-1227 Cheryl Blackburn, Judge

No. M2008-01218-CCA-R3-CD - Filed June 9, 2009

The Defendant, James Richard Lening, was charged with one count of aggravated criminal trespass, two counts of attempted robbery, one count of aggravated burglary, two counts of aggravated assault, and one count of vandalism over $1,000. Following a jury trial, he was convicted of one count of aggravated criminal trespass, one count of aggravated burglary, two counts of aggravated assault, and one count of vandalism over $1,000. The trial court sentenced him to eleven months and twenty-nine days for aggravated criminal trespass. The trial court sentenced him as a Range III, persistent offender to fifteen years for aggravated burglary and fifteen years for each count of aggravated assault. It also sentenced him as a career offender to twelve years for vandalism over $1,000. The trial court ordered that the Defendant's eleven month and twenty-nine day sentence for aggravated criminal trespass be served concurrently with his other sentences and that his fifteen-year sentences for aggravated assault be served concurrently with one another but consecutively to his other felony sentences. The trial court also ordered the Defendant to serve his fifteen-year sentence for aggravated burglary and his twelve-year sentence for vandalism over $1,000 consecutively to each other and consecutively to his concurrent sentences for aggravated assault, for a total effective sentence of forty-two years in the Department of Correction. In this direct appeal, the Defendant contends that: (1) the State presented evidence insufficient to convict him of aggravated burglary, aggravated assault, or vandalism over $1,000; and (2) the trial court erred in ordering consecutive sentencing. After our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Charles E. Walker, Nashville, Tennessee, for the appellant, James Richard Lening.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Rob McGuire, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The facts underlying the convictions in this case were contested at trial. The State first presented testimony from Jason Frye that sometime around 11:30 a.m. on February 24, 2007, he and his wife, Sandy Frye, were sleeping in their residence at 4211 Wood Street in Nashville. They woke up to a loud crashing noise. Mr. Frye at first believed that his cousin, who habitually knocked very loudly, had come for an unannounced visit; accordingly, he got up and walked to the door. A second impact from outside the door convinced him that someone was trying to break in. The door started to open following a third impact; Mr. Frye attempted to force it shut but was overpowered. He heard a man say, "Motherfuckers, I want your money." He therefore allowed the door to open, at which point a man stumbled into the residence. Mr. Frye identified this man as the Defendant. The Defendant wore a hooded jacket and had part of his head shaved, with short hair covering the rest of his head. Mr. Frye hit the Defendant in the face with his fist. The Defendant stumbled backwards down the outside steps, looked directly at Mr. Frye and ran away. Mr. Frye had never seen the Defendant before. Frye then tried to close his door but found that it had come off its frame. He therefore chained it shut. After looking out his windows to make sure the Defendant was gone, he asked Sandy Frye to call the police. Mr. Frye then walked outside to see if the Defendant had damaged anything there. Mrs. Frye corroborated this testimony.

Jenny Fontenot, who lived about one-half mile from the Frye residence at 1400 Station Four Lane, testified that she drove her car into her garage about 11:30 a.m. Her two-year-old son, Marcus Fontenot, was in the backseat of the car. After she pulled in but before she turned her car off, she saw, in her side mirror, a man holding a knife coming toward her. Ms. Fontenot identified this man as the Defendant and testified that he had blood on his face and in his mouth. He wore a t-shirt but not a jacket, and she also noticed his partially shaved head.

Ms. Fontenot screamed; the Defendant told her that if she did not come out of her car he would kill her and her son. Ms. Fontenot scrambled into the front passenger seat in an effort to reach her son and leave the car, but the Defendant followed her around the car. The Defendant then tried to puncture the car's tire with his knife, but he was not able to do so. He also tried to break her window with the knife but was unsuccessful. The Defendant then lifted a nearby air compressor and pounded it into the car's windshield. Ms. Fontenot continued to scream and honk her car horn. As the Defendant hit her windshield with the air compressor for the third or fourth time, Ms. Fontenot worried that the glass would break. She therefore returned to her driver's seat and, after determining that the car was still running, backed out of her garage. The Defendant ran away; seeing which way he went, Ms. Fontenot followed while calling 911 on her cell phone. She asked some nearby construction workers to help her follow the Defendant. One of the workers apparently followed the Defendant while Ms. Fontenot stayed in the area near her house. Her son Marcus, who had been silent during the attack, began to cry. Ms. Fontenot testified that the damage to her car totaled more than $1,000.

Officer Philip Meador of the Metro Nashville Police Department responded to Ms. Fontenot's 911 call and met Ms. Fontenot and some of the other construction workers. Officer Meador drove in the direction Ms. Fontenot indicated, and Ms. Fontenot followed him. When they reached nearby Stokley Lane, Ms. Fontenot stopped and, although she was still quite distressed, eventually communicated to Officer Meador that she saw her assailant standing in a nearby yard. Officer Meador then approached the Defendant and took him into custody. The Defendant did not resist. While Officer Meador was transporting the Defendant, he received information about the Fryes' earlier call, which contained a description matching the Defendant. Officer Meador drove to the Fryes' residence, where both Jason and Sandy Frye positively identified the Defendant as their assailant as he sat in the back of Officer Meador's car.

Officer William Kirby of the Metro Nashville Police Department's identification section also testified about his investigation of the events at Fontenot's residence. He found an overturned air compressor in Ms. Fontenot's garage and a knife handle with a broken-off blade in her driveway. He did not recover the missing blade. He was not able to recover fingerprints from the knife, most likely because the knife had been rained on before he arrived and the surface of the air compressor was such that it did not retain fingerprints. He also investigated the Frye residence and confirmed that the casing around their door had been damaged.

The Defendant testified that on the evening of February 23, 2007, he had been at Cragnacker's, a sports bar in Hermitage. There, he met a girl named Michelle who was friends with Jason and Sandy Frye. Two of the Fryes' other friends, Jennifer and Mike, were also present. The group drank at Cragnacker's for some time and later ended up back at the Fryes' residence "partying, drinking, doing drugs and drinking and things like that."

At some point, the Defendant passed out. He woke up in the morning to find Jason and Mike shaving his head. The Defendant, still "messed up" on alcohol and pills, started fighting them. The fight moved outside, where Jason and Mike were joined by another of their friends, Chris, who had arrived at the Fryes' residence sometime the night before. Jason, Mike, and Chris kicked the Defendant repeatedly before fleeing into the house. The Defendant then beat on the door a number of times, demanding that the Fryes give him the jacket, cell phone, and drugs he had left in the house. Jason opened the door and hit the Defendant in the face with a stick. Jason and the others, wielding sticks and bats, then chased the Defendant as he ran away down the street. Eventually he reached Ms. Fontenot's house, approached her car, and asked her to call the police. He said he did not have a knife and did not vandalize her car. He saw Ms. Fontenot on her cell phone and assumed that she was calling the police in order to help him. He therefore waited nearby and was arrested when the police arrived.

The jury found the Defendant guilty of aggravated criminal trespass, aggravated burglary, vandalism over $1,000, and two counts of aggravated assault. The jury found him not guilty of two counts of attempted robbery. He now appeals.

Analysis

I. Sufficiency of the Evidence

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

A. Aggravated Burglary of the Fontenot Residence

The Defendant first contends that the State presented evidence insufficient to convict him of aggravated burglary of the Fontenot residence. Tennessee Code Annotated section 39-14-403 defines aggravated burglary as "burglary of a habitation as defined in [sections] 39-14-401 and 39-14-402." "A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building and commits or attempts to commit a felony, theft, or assault." Tenn. Code Ann. § 39-14-402(a). "Enter" in part means "[i]ntrusion of any part of the body." Tenn. Code Ann. § 39-14-402(b)(1). "Habitation" means "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons." Tenn. Code Ann. § 39-14-401(1). The Defendant concedes that Ms. Fontenot's testimony established that he committed an assault inside her habitation; he argues, however, that her testimony did not establish that he lacked effective consent to be in her garage.

"A conviction based on circumstantial evidence is permitted in Tennessee." State v. Tharpe, 726 S.W.2d 896, 899 (Tenn. 1987) (citations omitted). "The law is firmly established in this State that to warrant a criminal conviction upon circumstantial evidence alone, the evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and

must exclude every other reasonable theory or hypothesis except that of guilt . . . ." Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970).

Ms. Fontenot did not explicitly testify that the Defendant did not have her permission to be in her garage. Nevertheless, Ms. Fontenot's reaction to his presence and the Defendant's actions inside the garage clearly established that he did not. This issue is without merit.

B. Aggravated Assault on Marcus Fontenot

The Defendant next contends that the State presented evidence insufficient to convict him of an aggravated assault on Marcus Fontenot. Tennessee Code Annotated section 39-13-101(a)(1) provides that a person commits assault who "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." A person commits aggravated assault who "intentionally or knowingly commits an assault as defined in [section] 39-13-101 and: (A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(1). Marcus Fontenot did not testify at trial and, on this basis, the Defendant argues that the State failed to establish that Marcus was in fear or saw the Defendant display a deadly weapon.

> This Court
> has held that '[t]he element of 'fear' is satisfied if the circumstances of the incident, within reason and common experience, are of such a nature as to cause a person to reasonably fear imminent bodily injury. Thus, the apprehension of imminent bodily harm may be inferred' from these surrounding circumstances.

State v. Christopher Carter, No. W2006-02124-CCA-R3-CD, 2007 WL 3391385, at *5 (Tenn. Crim. App., Jackson, Nov. 15, 2007) (quoting State v. Gregory Whitfield, No. 02C01-9706-CR-00226, 1998 WL 227776, at *2 (Tenn. Crim. App., Jackson, May 8, 1998)).

The Defendant cites to State v. Jessie James Austin, No. W2001-00120-CCA-R3-CD, 2002 WL 32755555 (Tenn. Crim. App., Jackson, Jan. 25, 2002). The defendant in Austin threatened two brothers with a gun. Only the older brother testified, including in his testimony the fact that the defendant pointed the gun directly at the younger brother. Largely on that basis, this Court upheld both of the defendant's convictions for aggravated assault. The Defendant attempts to distinguish his case from Austin by arguing that "there is no evidence that the [D]efendant ever spoke directly to [Marcus] or that [Marcus] was aware of his presence" and "no evidence that [Marcus] could even see the objects or that he was in fear."

In our view, the evidence presented at trial is sufficient to support the conviction for the aggravated assault on the child victim. According to his mother, Marcus was "traumatized" during the attack and "very upset" after it. A reasonable jury could have concluded that Marcus was aware of the Defendant's presence and reasonably feared imminent bodily injury. Further, the Defendant used a knife and an air compressor as weapons immediately outside the vehicle in which Marcus was sitting. This issue is without merit.

C. Vandalism of Ms. Fontenot's Automobile

The Defendant next contends that the State presented evidence insufficient to convict him of vandalism over $1,000. Tennessee Code Annotated section 39-14-408(a) states that "[a]ny person who knowingly causes damage to or the destruction of any real or personal property of another or of the state, the United States, any county, city, or town knowing that the person does not have the owner's effective consent is guilty of an offense under this section."

The Defendant argues that the State did not present evidence sufficient to establish that he did not have Ms. Fontenot's effective consent to damage her car. As did his similar contention against the sufficiency of his aggravated burglary conviction, this argument lacks merit. Although Ms. Fontenot did not explicitly state that the Defendant did not have her consent to damage her car, she testified regarding her negative reaction to the Defendant's presence and conduct; under these circumstances, any rational jury could have found by circumstantial evidence that the Defendant knew he did not have Ms. Fontenot's consent. See Tharpe, 726 S.W.2d at 899.

Vandalism is punished as theft. Tenn. Code Ann. § 39-14-408(c). Thus, vandalism is a Class D felony if the damage to the property is $1,000 or more but less than $10,000. See Tenn. Code Ann. § 39-14-105(3). The Defendant argues that the State did not sufficiently prove the amount of the damages to Ms. Fontenot's car. Ms. Fontenot testified that the amount of the damage to her car was over $1,000, but she did not state an exact amount of the damages. This Court has held, however, that such testimony is sufficient. See State v. Brooks, 909 S.W.2d 854, 859 (Tenn. Crim. App. 1995). This issue is without merit.

II. Consecutive Sentencing

The Defendant argues that the trial court erred by imposing consecutive sentences. He argues that the aggregate length of the sentences does not reasonably relate to the offenses committed. On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement

and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

The presentence report in this case indicates that the Defendant is unmarried. He dropped out of high school after completing ninth grade but received a high school equivalency degree while in the Metro Davidson Detention Facility. He has also earned certificates in Life Skills, Computer Information Processing, and Plumbing. The Defendant has experienced problems with drugs and alcohol, but he reported no physical or mental disabilities. He was thirty-five years old at the time of sentencing. He reported some employment history as a truck driver, construction worker, and retail employee.

The Defendant's record of criminal convictions begins in 1991 and includes fifteen misdemeanor convictions, including four convictions for driving under the influence, four assault convictions, three convictions for driving on a suspended driver's license, and one conviction each for resisting a stop and frisk, casual exchange, public intoxication, escape from jail, and evading arrest. His record also includes five felony convictions, including three convictions for the sale of Schedule VI drugs over .5 ounces, one robbery conviction, and one voluntary manslaughter conviction.

The Defendant contends that the trial court improperly ordered him to serve two fifteen-year sentences and a twelve-year sentence consecutively for a total effective sentence of forty-two years. Tennessee Code Annotated section 40-35-115(b) lists the factors that may support the imposition of consecutive sentencing. The trial court in this case ordered consecutive sentencing based on its findings that the Defendant is an "offender whose record of criminal activity is extensive" and a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." See Tenn. Code Ann. § 40-35-115(b)(2), (4).

If a defendant is properly found to meet one of the statutory criteria for consecutive sentencing, then the decision as to whether to impose consecutive sentences is a matter addressed to the sound discretion of the trial court. See State v. James, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984). "The imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

The trial court in this case properly found the Wilkerson factors were applicable. Even if it had not, the trial court also found that the Defendant is an offender who possessed an extensive

criminal record. Both factors support the imposition of consecutive sentences. In our view, consecutive sentences were warranted. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's convictions and sentences.

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DAVID H. WELLES, JUDGE